

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF WEST VIRGINIA
3 The Kay Company, LLC, et al.,
4 Plaintiffs,
5 VS. CIVIL ACTION NO.
6 1:13-cv-151
7 EQT Production Company, et al.,
8 Defendants.

9 - - -

10 Proceedings had in the hearing of the above-styled action
11 on January 31, 2018, before Honorable John Preston Bailey,
12 Judge, at Wheeling, West Virginia.

13 - - -

14 APPEARANCES:

15 On behalf of the Plaintiffs:

16 Marvin W. Masters
17 The Masters Law Firm, LC
18 181 Summers Street
Charleston, WV 25301
304.342.3106

19 Michael W. Carey
20 Carey, Scott, Douglas & Kessler, PLLC
21 707 Virginia Street, East
PO Box 913
Charleston, WV 25323
304.345.1234

22
23 APPEARANCES CONTINUED ON NEXT PAGE
24
25

On behalf of the Defendants:

David K. Hendrickson
Hendrickson & Long
PO Box 11070
Charleston, WV 25339
304.346.5508

John K. West
Steptoe & Johnson
41 South High Street, Suite 2200
Columbus, OH 43215
614.458.9889

Proceedings recorded utilizing realtime translation.
Transcript produced by computer-aided transcription.

1 Wednesday Morning Session,
2 January 31, 2018, 10:00 a.m.

3 - - -

4 THE COURT: I would ask the clerk to call the case.

5 THE CLERK: This is the case of The Kay Company, LLC,
6 et al., versus EQT Production Company, et al., Civil Action
7 Number 1:13-CV-151.

8 Will the parties please note their appearance for the
9 record.

10 MR. MASTERS: Marvin Masters for plaintiff.

11 MR. CAREY: Mike Carey for the plaintiffs.

12 MR. HENDRICKSON: David Hendrickson, Your Honor, for
13 the defendants.

14 MR. WEST: Kevin West for the defendants, Your Honor.

15 THE COURT: Where do you want to start? Looks like
16 we've got a motion to approve class notice, we've got
17 objections to my January 5 order, and we have a motion to
18 continue.

19 I guess we ought to start with the objections to the
20 January 5 order. In that order I asked EQT to let me know if
21 they contend there are any leases that meet the standard. They
22 sent me a list of 5500-plus leases that they contend satisfy
23 Tawney, which I think is probably less than -- or more than we
24 had at the last hearing. Either they don't understand my
25 ruling of January 5, or they're messing with me.

1 Now, Mr. Hendrickson, what's your best lease to try
2 this -- I'm sorry, Mr. West, what's your best lease to try to
3 satisfy what I have now determined to be the Tawney standard?

4 MR. WEST: If the Court please, there are two
5 examples, and I can provide the Court with the exemplary
6 language from the two examples, and I do think that there are
7 less than originally determined to be Tawney compliant, but
8 what we did is we took the language, particularly at pages 27
9 and 28 of your order, and looked at that and went back and
10 looked at lease language. And I can provide, if the Court
11 please, the two examples that we used.

12 THE COURT: That would be wonderful.

13 MR. WEST: May I approach, Your Honor.

14 THE COURT: Sure.

15 MR. WEST: And Your Honor, with regard to the leases
16 that are on the list, all of them fall within these two
17 categories. They contain language that's either on example one
18 and example two, and with regard to example one, we -- just
19 looking down through there, it talks about how you defined
20 amount realized. It says that it's the amount received by the
21 lessee for the sale of the gas, minus any and all reasonable
22 and actual production costs and expenses, and we realize that
23 your order addressed reasonable and said that that's not
24 sufficient.

25 THE COURT: Right.

1 MR. WEST: But we -- it's our position that while
2 that may not be sufficient alone, that if it satisfies it, if
3 it satisfies the test that you've set forth, and then just
4 happens to have that reasonable language, that the reasonable
5 language would not disqualify it from being Tawney compliant.

6 So it does talk about how you go about calculating
7 the royalty. There are specific deductions that it talks
8 about, gathering and/or affiliates, cost associated with
9 gathering or -- and/or its affiliates between the wellhead and
10 point of sale.

11 Then it gets even more specific. It says, including,
12 but not limited to, costs associated with the following:
13 Gathering or transporting the gas from the well to the point of
14 sale. It gets even more specific. Including line loss and
15 compressing. More specific. Including the cost of
16 electricity, gas, or other fuel, and desulfurization and
17 purification, treating, dehydrating, extracting, processing,
18 storage and marketing, cleaning and removal of liquid or
19 gaseous substances or impurities, and then talks about
20 severance and production taxes.

21 So we believe that even when you compare this against
22 the standard that you've set forth on pages 27 and 28 of your
23 order, that this is a lease that would be Tawney compliant.

24 For example two, it's very similar, in that at the
25 very beginning of the lease it talks about how you go about

1 calculating the royalty, 15 percent of the net amount realized
2 by the lessee, and then goes forward and defines how you
3 determine the net amount realized by the lessee; defines
4 postproduction costs very specifically, treating and processing
5 oil and gas, separating liquid, hydrocarbons from the gas,
6 transporting oil and gas, including, but not limited to,
7 transportation between the wellhead and any production or
8 treating facilities and transportation to the point of sale,
9 compressing gas for transportation and delivery purposes,
10 metering oil and/or gas to determine the amount sold and used
11 by the lessee, sales charges, commissions, and fees paid to
12 third parties, whether or not affiliated, any and all costs and
13 expenses of any kind incurred in regard to gas or the handling
14 thereof.

15 It specifically says that lessee may use its own
16 pipelines and equipment to provide such treating, processing,
17 separating, transportation, compression, and metering services,
18 or may engage others to provide. And if it uses its own
19 pipelines, the postproduction costs shall include, without
20 limitation, reasonable depreciation and amortization expenses
21 related to such facilities, together with the lessee's cost of
22 capital and reasonable return on its investment in such
23 facilities. So we believe that in this instance also that this
24 satisfies the standard that's set forth on pages 27 and 28.
25 And we realize there was discussion on reasonable and what

1 relevance that had.

2 We do think that in the second phase, once you
3 determine whether a lease is compliant with Tawney, that
4 certainly under Wellman and Tawney then it becomes relevant to
5 look at whether the costs that were charged were actual and
6 reasonable. And I think that the Court had noted that in prior
7 orders, that this is a two-step process. And where we are
8 right now is looking at step one, is that does the lease comply
9 with Tawney. And we think that under the standard that you've
10 announced in your order, that these two examples do satisfy
11 that. And we would represent to the Court that all of the
12 leases on the list that we provided you and are filing are
13 leases that have either the first or the second example as a
14 royalty language.

15 THE COURT: Mr. Masters, Mr. Carey.

16 MR. CAREY: Your Honor, as the Court has pointed out
17 in its most recent order on this issue, there's three
18 components of Tawney. Generally, the lease must -- if the
19 lessee intends to allocate any costs, postproduction costs, to
20 the lessor, it must generally set forth in the lease it intends
21 to do so; second, the lease must specify with particularity the
22 postproduction costs that they intend to deduct; and third,
23 must specify the methodology by which those deductions will be
24 calculated.

25 What they've done in these two examples is comply

1 perhaps with the second element, specify with particularity
2 those postproduction costs it intends to deduct. But nowhere
3 is there any methodology upon which those particularized
4 deductions will be calculated.

5 Initially, the first example has the language
6 reasonable and actual, and in the prior hearing they relied on
7 that language to say based on the McDonald case that that
8 provides the methodology. Now, in light of the Court's order,
9 they're saying, well, no, it's not the methodology. It's just
10 a additional statement to comply with what is required by
11 Wellman. Well, no. There is no methodology in example number
12 one. There --

13 THE COURT: Is there a waiver of the methodology in
14 number one in the last sentence?

15 MR. CAREY: Reasonable discretion? No.

16 THE COURT: I don't know why -- I mean, I don't know
17 why the hell someone would sign this lease, but they've talked
18 about what costs are going to be -- what types of costs are
19 going to be deducted. And then they say that the lessee shall
20 have the right to allocate postproduction costs and expenses in
21 its reasonable discretion.

22 MR. MASTERS: May I address that, Your Honor?

23 THE COURT: You sure can.

24 MR. MASTERS: We just got this this morning, so --
25 but here's the reasonable discretion. First of all, it still

1 has "reasonable" in it. And so it has the same problem as
2 saying "reasonable" in the sense that they had discretion
3 before. I mean, they do it. They make the decision. So I
4 don't see where it gives them anything else, what they already
5 had or have been doing. I see nothing else there. Unless it
6 means -- the only thing the Court would have to say is -- which
7 I don't think this would be an accurate interpretation of any
8 lease like this -- is that they could take anything that they
9 want for however much and figure it out, a method by whatever
10 means. As long as it has "reasonable" in it, then I think they
11 still have to comply with reasonable and actual.

12 THE COURT: I'm not disputing that.

13 MR. MASTERS: I know what you're saying.

14 THE COURT: What I'm saying is we got three kinds of
15 leases. We got your flat rates, which are over here a little
16 bit. We've got your non-Tawney compliant. And on those it's
17 real easy. They can't take anything. Then you have your
18 Tawney compliant, to the extent I find there are any. And they
19 can take deductions. But they have to be reasonable and
20 actual.

21 MR. MASTERS: Correct.

22 THE COURT: And if they're not reasonable and actual,
23 then they give the money back. So I'm not in any way, when I
24 say they waived -- I'm pretty close here, in example one, they
25 waived the right to have methodology set forth in the lease, by

1 saying that the lessee can charge anything they want in these
2 categories. Now, we'll find out later whether it's reasonable
3 and actual. We find that out at trial.

4 MR. MASTERS: Okay.

5 MR. CAREY: Your Honor, not to double-team you, but
6 can I respond to that?

7 THE COURT: Sure.

8 MR. CAREY: The Court laid out very appropriately, I
9 think, in its order the fact that many courts have held that
10 there is no fiduciary relationship. And in that regard the
11 defendants control all the information. And the plaintiffs
12 have no access to that. And so for them -- this to constitute
13 a waiver, you would have to find that they give up any right to
14 challenge the methodology, that they would simply be limited to
15 actual and reasonable.

16 But the Court posited many questions that methodology
17 would answer that the phrase "reasonable discretion" doesn't
18 even come close to comporting with. And that is, in this case,
19 you asked what is included within reasonable costs. Does it
20 include only the direct costs of providing the service, or does
21 it include indirect costs, including meals and entertainment,
22 uniforms, meter operations and repair, personal property taxes,
23 personnel costs, production management costs, depreciation, and
24 return on investment. Are costs apportioned by the language of
25 the gathering lines, by the decatherm, or some other method.

1 Without the answers to these and other questions, the lease
2 fails to define the methodology for calculating this.

3 This doesn't constitute a waiver. It's just a
4 reaffirmation of what they say before, that they will be,
5 quote, reasonable and actual. It doesn't provide notice to the
6 lessee -- I'm sorry, to the lessor that he is going to be
7 subject to all these variations of possible different methods
8 of calculation, direct cost, indirect cost, length of
9 transporting, does our gas need to be stripped of liquids or
10 not, does it need to be compressed to reach pipeline pressure
11 or not, those are the kinds of things that simply could not
12 constitute a waiver simply by using the phrase "reasonable
13 discretion," and therefore doesn't meet the requirements.

14 MR. HENDRICKSON: Judge, can I say a couple words?

15 THE COURT: You've been remarkably quiet so far.

16 MR. HENDRICKSON: I think you hit the nail on the
17 head. I mean, the second part of the trial, if the trial is
18 going to be whether or not they're actual and reasonable,
19 that's for the jury to determine. We set out in the lease what
20 type of charges we're going to take. And the problem with
21 doing it in a class action -- and again, we're past that phase,
22 and I understand that -- is that there are a lot of variations
23 between where people's wells are located, what type of gas they
24 have in there, how high the decatherm count is, all those
25 variations have to come into play, and so it's nearly

1 impossible to write a lease that is tailor made for each of
2 those situations.

3 THE COURT: That's not true. I just -- I had a class
4 action filed -- I don't know if you were involved in it or
5 not -- where the leases had an amount set forth, like \$2 for
6 postproduction costs.

7 MR. HENDRICKSON: I wasn't in that --

8 THE COURT: I said that's fine. That's set forth the
9 methodology and --

10 MR. HENDRICKSON: Obviously, we don't have that here.

11 THE COURT: No.

12 MR. HENDRICKSON: But whatever the charges we have,
13 it's up to us to show what we took and then whether or not --
14 which is the actual part, and then the reasonable part is, is
15 that reasonable under the circumstances. That's our burden in
16 that situation.

17 THE COURT: That's your burden in phase two.

18 MR. HENDRICKSON: Correct.

19 THE COURT: Your burden in phase one is do you have
20 the right to take any.

21 MR. HENDRICKSON: And I think that lease gives us a
22 right to take. We set amount and we tell them what we're going
23 to do.

24 THE COURT: Is there anywhere in here where you tell
25 them you're going to take meals?

1 MR. HENDRICKSON: No.

2 THE COURT: Or uniforms or vacations for the --

3 MR. HENDRICKSON: But it's just like -- you're going
4 to an extreme there, but it's just like when you hire a moving
5 company and you say, I want to move my household goods from A
6 to B, they give you a charge. You don't know what that charge
7 incurs. The charge -- it probably includes uniforms, it
8 probably includes meals, it probably includes gas.

9 THE COURT: And I know what the charge is up front.
10 These people don't.

11 MR. HENDRICKSON: But it's up to us to prove,
12 according to law, whether or not they're actual and reasonable.

13 THE COURT: That's phase two.

14 MR. HENDRICKSON: Correct.

15 THE COURT: Phase one is do you have a right to take
16 them under Tawney.

17 MR. HENDRICKSON: We think we do in this type of
18 lease.

19 THE COURT: I understand you think you do and on --
20 I'm going to find that example one, if you've got the language,
21 first of all, that allows you -- if you've got example one
22 language, all of it, I find that satisfies Tawney. I don't
23 know how many that is.

24 MR. HENDRICKSON: We'll have to get you that count,
25 get you the list.

1 THE COURT: Let's talk about example two. I focused
2 on example one. I'm not so sure.

3 Mr. Carey, you want to --

4 MR. CAREY: Well, unless I'm overlooking it in my
5 advanced age -- I don't see well.

6 THE COURT: You're not that advanced.

7 MR. CAREY: Well, my brain thinks I am. I don't see
8 anything about the reasonable discretion language that the
9 Court believes constitutes a waiver in one. And it doesn't
10 even have "reasonable and actual" up in the body of the -- as a
11 preface to the postproduction costs that exist in example one.
12 What it does have is a detailed list to comply with perhaps the
13 second requirement of Tawney.

14 THE COURT: Tawney part two.

15 MR. CAREY: Tawney part two. But nowhere is there
16 any language that either constitutes a waiver or specifies
17 methodology. And so I don't believe that there's any way that
18 this one --

19 THE COURT: I agree.

20 Go ahead. Take your last shot.

21 MR. WEST: I'm sorry, Your Honor. I was just going
22 to say -- I'll be brief -- that I do think if you look at your
23 decision in Kinney, one of the things you very aptly did is you
24 went through and said, in this lease it shows you're going to
25 take the volumes, you're going to take the revenue, and then

1 this is what it says you can deduct. I think this example does
2 that. It doesn't -- in Kinney they said it's \$2 is the actual
3 and reasonable. But I think that goes to the second phase
4 rather than the first phase. It's our position if you look at
5 your decision in Kinney and if you look at this, that this
6 would state a methodology. All right.

7 THE COURT: Example one satisfies Tawney. Example
8 two does not. No methodology in there. So we've taken care of
9 that. With that exception, I'm not going to reconsider my
10 January 5 order.

11 Let's talk about your objection to the class notice.
12 Do you have a purpose here? Did you drive?

13 MR. HENDRICKSON: Actually, Your Honor, I'm just here
14 to see you. That's it.

15 THE COURT: By the way -- I shouldn't put this in the
16 middle of the hearing. When the hearing's over.

17 MR. HENDRICKSON: I had nothing to do --

18 MR. WEST: As set forth in our written pleading that
19 we made, our primary argument with regard to the class notice,
20 we're not objecting to the way it was drafted, their methods of
21 serving it. We believe it's premature. We believe that there
22 are issues with regard to who should get notice in this case.
23 We've mentioned several, but I think there are two that are
24 very good examples.

25 For instance, with regard to flat rate leases that

1 have not been converted, and we intend to file a motion with
2 the Court, provide information as part of that motion to
3 opposing counsel that these are the ones that we say have not
4 been converted under the flat rate statute and so they
5 shouldn't be part of the class because with regard to those
6 leases, the rate that they get paid -- what they get paid is
7 set. So to the extent they have a pricing claim, it doesn't
8 come into effect.

9 To the extent that they're claiming there's an issue
10 on volumes, which we intend to file a motion on that to address
11 how that should be dealt with as far as at trial, whether there
12 is a claim for that or not, but with regard to those flat
13 rates, on ones that have been converted, they don't have any
14 claims that would fall within anything that's been raised in
15 this litigation as a complaint about --

16 THE COURT: You said the ones that have not been
17 converted?

18 MR. WEST: Yes, Your Honor.

19 THE COURT: Okay. Go ahead.

20 MR. WEST: So we think we should be -- at the very
21 least, we should be given an opportunity to file a motion,
22 there be a determination which of those are in, which of those
23 are out, before the class notice is sent.

24 Secondly, another very similar example is with regard
25 to those based on an index price where the royalties be

1 calculated on 90 percent of a TECO rate. There are no
2 deductions taken on those. And so we would -- we intend to
3 file a motion on that saying -- on those that's not falling
4 within any of the claims that have been raised by the
5 plaintiffs in this case, so they should be knocked out.

6 So we think that the Court should decide those
7 issues -- and we can get them before Court very promptly -- but
8 the Court should decide those issues before any notice should
9 send out, because it would be confusing to someone that had a
10 lease but it fell within one of those categories if they
11 received a notice and think that they may have a claim when, in
12 fact, they have no claim at all, not any.

13 MR. MASTERS: Yes, Your Honor. The flat rate
14 nonconverted, we believe we can determine that from the
15 database we have. And there's no reason that they can't
16 produce a list of those, if they wish. I'd prefer they did. I
17 asked them to do that a long, long time ago because we knew
18 this was going to be an issue. And they just haven't done it.

19 THE COURT: Why not?

20 MR. WEST: We didn't know what they were. We've been
21 working on that and we -- I think that we -- it has to be
22 checked, but I think that we -- we're very close to having a
23 list, so --

24 THE COURT: I would think you'd have that list as a
25 matter of routine, I mean, so you know how the guy gets paid.

1 MR. WEST: And I understand that, Your Honor. But
2 the only way to come up with it, and what we've done is having
3 to do cross-referencing between flat rates and then looking at
4 situations where deductions have been taken, which would
5 indicate that if there were deductions taken on a flat rate,
6 that it has been converted. And so we're just trying to
7 confirm that that list is actually correct and that all of
8 those fall -- either do or don't fall into that category.

9 MR. MASTERS: So anyway, I see no reason that we
10 can't discern it the best we can from the database that we've
11 been provided or that they can't get that to us promptly in
12 time to include or take out their names and addresses from the
13 list. I mean, I have no problem doing that, flat rate,
14 obviously nonconverted, would not be entitled to any money out
15 of this particular class action.

16 I didn't understand what you were talking about
17 volumes, Kevin.

18 MR. WEST: Well, you've -- if you've raised claim
19 with regard to the calculation whether royalty should be paid
20 on the gas.

21 THE COURT: Volume at the wellhead or volume at the
22 point of sale.

23 MR. WEST: We intend to file a motion on that issue,
24 but to the extent on a flat rate that's not an issue. On an
25 index price that's not an issue. That's what I was saying

1 about it.

2 MR. MASTERS: Well, I don't necessarily agree on the
3 index price. I mean -- anyway.

4 THE COURT: How do you calculate index price?

5 MR. WEST: I think that the leases that have index
6 price say that you get 90 percent of the TECO rate for gas
7 which is sold.

8 THE COURT: Using what volume?

9 MR. WEST: Gas which is -- for the gas which is sold.

10 THE COURT: So they would -- it would be not volume
11 at the wellhead. It would be volume at sale.

12 MR. WEST: Correct.

13 THE COURT: So to the extent -- so they would be
14 included to the extent there's a claim for loss in
15 transmission.

16 MR. WEST: And on that, as I said, we will be filing
17 something on that, but that would be their only possible claim
18 was on the lost and unaccounted for gas.

19 THE COURT: Okay.

20 MR. MASTERS: So anyway, now I understand what he's
21 talking about. I mean, we contend that they would still be in
22 the class. If they would get with me and Mike and sit down and
23 show us something that we don't understand, right now I have no
24 problem -- I don't want somebody noticed that has no claim.

25 So anyway, what our position is, we need to get

1 notice out. This case has been pending since '13, and we're
2 supposed to give notice as soon as practicable and we are
3 several months beyond the time and plaintiffs allow them --
4 don't allow them, but we did not file anything till they did
5 their Fourth Circuit appeals and that sort of thing, and
6 objections. So now it's time to do it.

7 Now, another issue has arisen. And still don't have
8 an answer on this, Judge, and that's this: In the first
9 settlement we have a list of all those lessors that were in the
10 settlement that was considered or classified as different types
11 of leases. And you remember there was a lot of controversy
12 over us getting that classification and so forth. But
13 anyway, at the end of the day we received it. I sent them a
14 list of those leases. And I'm not bringing this up for
15 resolution today, but I'm just telling the Court, I brought up
16 a list, sent them a list of leases in that first group of the
17 settlement, first settlement in '08, that had to be in the
18 system when this -- in the time period that this class action
19 is covering. And we still don't have that. We've searched,
20 used everything we can do to find them in the spreadsheet. And
21 we haven't been able to do it.

22 So we will intend to notice those people if they have
23 a claim under what you certified in this case. We have their
24 names and addresses, use the same methodology we did before,
25 unless they can identify them in the spreadsheet they provided

1 to the Court and Court's already ruled on. So I don't think
2 it's going to change anything. I mean, if there's -- sorting
3 it out and maybe we can get together and these type of leases
4 here are flat rate nonconverted, we can figure that out. But
5 we assumed all the leases were in the spreadsheet. But it
6 doesn't appear that way. And I approached them about that,
7 sent them a list a long time ago and confirm one way or the
8 other. We don't have that. And I've been told that they're
9 still working on that. But we don't have it. So our intent,
10 absent the Court's ruling, at some point to send these people
11 notices, if they fall -- if, according to their lease, it falls
12 within the class.

13 MR. HENDRICKSON: There are about 3,000 leases that
14 he's talking about from the earlier class. I've asked for them
15 in an Excel spreadsheet or Word document. We'll go back and
16 search it against the leases we produced and try to figure out
17 what's what. We're in the process of doing that right now.
18 And we will also get with them on the flat rate issue and the
19 index issue and any other ones we have, in order to come up
20 with a list that they can then use for the purposes of
21 notification.

22 THE COURT: What's the ending date of the class?

23 MR. MASTERS: I'm sorry?

24 THE COURT: Ending date of the class.

25 MR. MASTERS: Oh, I had that. Let's see.

1 THE COURT: September 17, 2017.

2 MR. MASTERS: Yeah, that's it. December 8, '08, to
3 9-17-17. Yes, Your Honor.

4 MR. HENDRICKSON: Still presents an issue. I didn't
5 think we were including the new acquisitions that occurred in
6 that time period. I mean, we had several that I don't think
7 we've included those leases in the database we provided to
8 Mr. Masters. And they certainly didn't predate back to '07.
9 And so that's why we've asked which ones aren't you putting in
10 there, so that we have assurance which ones are. That's the
11 issue. We can't -- it's not as clear-cut just to do a date.

12 THE COURT: Well, did you read his response?

13 MR. HENDRICKSON: I didn't.

14 THE COURT: Okay. Plaintiffs agreed not to include
15 lessors from new businesses in order to facilitate the
16 conclusion of this action.

17 MR. HENDRICKSON: I knew that, Your Honor, but we
18 don't still have an understanding as to what that means from
19 them.

20 THE COURT: All right. What does it mean?

21 MR. MASTERS: Well, you may recall that in a hearing
22 here they brought up the fact that they purchased from, I
23 believe, TransEnergy and Rice, it was two or three other
24 companies, in the period that we were litigating this case. It
25 was brought up and I indicated that the plaintiffs would not

1 intend to try to incorporate those new purchases into this
2 action because we wanted the case to move on along with what we
3 had before the Court then. And that's what you -- what I
4 agreed to and that was it.

5 MR. HENDRICKSON: And the last hearings we always
6 heard, we want to look at it and get back to you. This is the
7 first time today we're getting exact dates. So with that
8 understanding with the Court and understanding that's going to
9 be the Court's order in this situation, we can move forward and
10 we're good with that.

11 The other point I'd like to bring out is that I think
12 we have an agreement that damages for this class will be cut
13 off as of the end of the year '17, so that both sides are
14 talking about the same numbers, as opposed to trying to bring
15 it right up to trial.

16 MR. MASTERS: That's probably realistic, Your Honor,
17 to be able to calculate damages, because of the volume that
18 we're dealing with. I think that would probably -- we probably
19 need to do that.

20 THE COURT: Okay.

21 MR. MASTERS: I could supplement, but then coming up
22 on trial there would be -- they have objections and so forth,
23 I'm not sure --

24 THE COURT: 12-31-17.

25 MR. MASTERS: Yes, Your Honor.

1 MR. HENDRICKSON: Yes, Your Honor.

2 THE COURT: Mr. Masters, what's your response to the
3 motion to continue?

4 MR. MASTERS: Your Honor, this case has been pending
5 so long, to be honest with you, we have motions pending now to
6 produce documents that they ultimately -- it was filed in
7 August of last year and we have been trying to work with --
8 because it is very complex and difficult to obtain the records
9 needed to determine whether all these charges are reasonable.
10 And actual. In order to do that, we have to go back to the
11 source of the charges, and so at this point Kevin and Dave met
12 with us right before the hearing and said after the hearing
13 they're going to get back with us, sit down and go over the
14 things that we need and I've identified for some time.

15 The only thing I worry about is the February 14 or
16 15th date, whichever it was. I wanted to send out class
17 notice. I don't think we can get it done and out by February
18 14. But we got to go forward. We will do our very best to go
19 forward and keeping in mind this: The Tawney case says it's
20 their burden and the stuff we've got right now, we can give an
21 opinion, but it is not -- I don't think they proved that any of
22 it's reasonable particularly. Okay?

23 So with that said, they don't produce the documents
24 that our experts have to look at, then I don't think they've
25 met that burden. But we object to the continuance at this

1 point.

2 THE COURT: Mr. Hendrickson, with regard to the
3 leases which this Court has found do not comply with Tawney --

4 MR. HENDRICKSON: Correct.

5 THE COURT: -- and for which deductions are being
6 taken, is there any issue?

7 MR. HENDRICKSON: Yeah, there is. With your ruling,
8 Your Honor, you've changed the sales point by your ruling from
9 where we have it now between production and energy, because
10 it's an affiliated company, to a downstream pipeline. Okay?
11 There are charges that are incurred between EE, moving that gas
12 to the pipeline. We have to now go back and that's part of the
13 complication in this, Judge, your rulings are your rulings,
14 okay? We have to comply with them.

15 So we have to go back now and look at this and we
16 think there are deductions beyond that point that we can still
17 take to get the gas to the new sales point. But we have to do
18 all that math and figure all that out. I mean, this is not --
19 first of all, I understand how long this case has been going,
20 but it's not a red car green/car case. It's a very complex,
21 complicated case and really a case of first impression in West
22 Virginia.

23 Tawney was tried on a very limited issue. This is
24 the first time a case like this is being tried on all issues
25 across all kinds of leases. And so what we're trying to do in

1 representing our client is put our best case on. We don't
2 think we can do that by May. We think we can do it by
3 November. And now that we have all the Court's rulings, I
4 think we do now, on all the types of leases and stuff, we can
5 figure out a game plan on how to put it all together. We have
6 some idea, but we still have to put the missing pieces
7 together.

8 We're going to get Mr. Master's his information.
9 He's entitled to his information. The stuff we tried to meet
10 with him before he got here -- and he's not feeling well and
11 didn't get here till later -- is to tell him we're going to
12 update everything he's asked us for through at least November
13 2017, because they're still closing the books out on '17, it's
14 just January of '18, and get him all of the rest of the
15 information he's asked us for, but at the same time we've got
16 to take that information ourselves and get it in a format ready
17 to present to a jury.

18 To answer your question, there are still issues,
19 Judge, even on what you consider to be the non-Tawney
20 compliant. There's still damage issues and how you're going to
21 calculate those damages. And that's something the jury is
22 going to have to determine, I assume.

23 THE COURT: Isn't the damages the return of the
24 money?

25 MR. HENDRICKSON: No, I don't think so.

1 THE COURT: You get to keep it?

2 MR. HENDRICKSON: I think there are some costs that
3 we've taken that we can deduct for. And again, that's where I
4 think you're looking at this differently.

5 THE COURT: I mean, Tawney is pretty clear. If it
6 doesn't comply with Tawney, you don't take postproduction
7 costs.

8 MR. HENDRICKSON: But these are transportation costs
9 from --

10 THE COURT: That's postproduction.

11 MR. HENDRICKSON: -- to another place. Well, you're
12 the one that picked the sales point. We didn't.

13 THE COURT: Doesn't make any difference.

14 MR. HENDRICKSON: Well, I respectfully disagree. And
15 I think that we are entitled to put that kind of information on
16 before the jury and let them make a determination as to whether
17 or not when we can take those kind of costs in non-Tawney
18 compliant leases.

19 MR. MASTERS: Your Honor, I would ask Dave to
20 explain, because I'm not following what he's saying.

21 MR. HENDRICKSON: The way we do stuff, Judge, even
22 prior to Tawney, the company made a decision to sell the gas at
23 the wellhead with the workback method, okay? Of cost. That's
24 what we did with selling the gas. All right? So the sales
25 point was when production sold it to EE.

1 And we've got rulings all over the board. Some
2 courts have ruled that those sales are okay. This court has
3 ruled that sale is not okay, but it's not to a nonaffiliated
4 company, okay? When you did that, you changed what effectively
5 for us is a sales point, which could be TECO, it could be
6 Dominion, it could be somewhere else on down the line, and it's
7 different which lease you're talking about and which pipe
8 system you're talking about.

9 There are costs that aren't taken that are put back
10 into the factoring of the royalties that we have to pay beyond
11 what's charged back to the royalty owners that we feel we can
12 present to the jury that are legitimate costs that we're
13 allowed to take. And right now, when you made your ruling, we
14 had to go back and figure all this out, because that was an
15 area that we weren't even thinking about in preparing our case
16 for trial.

17 MR. MASTERS: I am totally confused. I mean, if --
18 what they did was when they sent a check stub that had laid out
19 how much gas, the volumes and how much it sold per decatherm or
20 whatever, there was a place on there for deductions and then a
21 place where they paid them the net. So I don't see how it
22 changed anything when you explain that, David. You're showing
23 on the check stub that you're taking deductions and now you're
24 saying you really didn't have to do that.

25 MR. HENDRICKSON: That's not what I'm saying. I'm

1 saying we did a calculation that -- on the sale point being
2 from production to EE. And in that we calculated the cost of
3 getting it to there. Then when the judge made his ruling, he
4 changed the sales point. He changed the sales point to on down
5 the line. EE is paying a cost separate and above the charge
6 that EE is charging production to move that gas on down the
7 line to a new sales point. And so to simply say, okay, if we
8 pay 2.30 to the royalty owners but we got \$3 down here, so the
9 difference is because you wipe all those out, it's really \$3,
10 isn't accurate.

11 THE COURT: If it's not Tawney compliant, there are
12 no postproduction costs allowed. That's what Tawney says.

13 MR. HENDRICKSON: Okay. Let's take the Tawney
14 leases, the ones you say do comply. We still have to go back
15 and comply with the Court's order, and the Court's order is the
16 sales point is moved from here to here. That's a whole new set
17 of calculations on thousands of leases. And we have to put
18 that forward to the jury, because it's a measure of damages.

19 THE COURT: And you're telling me you make a separate
20 calculation for every lease individually?

21 MR. HENDRICKSON: Yeah, because every well is
22 different. Volumes are different. They go through different
23 systems.

24 THE COURT: I understand volumes are different.

25 MR. WEST: But Your Honor, they're also different

1 points of sale, so I think that that is adding a component as
2 far as determining, even if there are no deductions allowed at
3 all, what is the proper point of sale, and then comparing
4 whatever that's determined to be from the sales price used when
5 royalties were calculated for these leases, so that's one
6 issue.

7 One other factor that is going to take more time is
8 in your ruling on January 5th you talked about looking at the
9 gathering expenses on a well-by-well basis. I think you used
10 the example what if one -- for one well you're transporting it
11 a different length than you are for another well. And that
12 could go into the analysis.

13 THE COURT: The analysis is whatever you already did.
14 That's what we're going to look at, not what you could have
15 done or anything. It's what you have done and how you have
16 made the calculation up through December 31st. And we're going
17 to look at that calculation to see if it's reasonable and
18 actual on a Tawney lease.

19 MR. WEST: But Your Honor, I think -- using your
20 analysis, though, what may be reasonable for one well would not
21 be reasonable for another well. So for that reason you're
22 going to have to look at the gathering expenses and any
23 deductions that were taken and compare it to a particular well
24 rather than -- we had talked about before we were operating
25 under the assumption that we would go district by district and

1 whether a district charge was actual and reasonable or not, and
2 I think the plaintiffs were proceeding under that --

3 THE COURT: Don't you go district by district?

4 MR. WEST: We do.

5 THE COURT: Then that's all we need to do.

6 MR. WEST: Well, I -- if that's all we need to do,
7 then that's all we need to do, but looking at your opinion,
8 Your Honor, on page 28, where you talk --

9 THE COURT: Those are issues that, when there's no
10 methodology, are out there.

11 Now, I've said most -- some of the these leases don't
12 comply with Tawney. There's no methodology. Frankly, you give
13 the money back. There's ones where there is -- I've ruled that
14 there's a waiver of methodology, so the only question is going
15 to be is the method by which EQT takes postproduction expenses
16 reasonable and actual and does it include things which should
17 be included.

18 MR. CAREY: I thought we resolved this at the last
19 hearing, because they said that they make these calculations on
20 a district basis. And we agreed to challenge the
21 reasonableness and the actual -- where they're actually
22 incurred on a district basis as opposed to a well-by-well
23 basis.

24 MR. WEST: That's correct, and we did do that. What
25 I was saying, if you look at the Court's order on January 5 at

1 page 28 in talking about looking at what's actual and
2 reasonable, we thought that that had been changed.

3 THE COURT: It has not changed.

4 MR. CAREY: It doesn't change the approach -- our
5 approach to this case. We're going to show that taking meals
6 and uniforms in the district is unreasonable. Not for this guy
7 whether he showed up on this well on this day and went to Sam's
8 hamburger joint instead of Chop House.

9 MR. HENDRICKSON: Even with that, Your Honor, I just
10 don't think we're going to be ready by May. And I understand
11 how long this case has been on your docket, but it's a very
12 important case for our client. We deserve to be able to put
13 our best foot forward. We're working as hard as we can. I
14 know you may hear from the plaintiffs that we're not, but we
15 really are. All these documents aren't stored in the back room
16 of our office. If they were, I'd need three more offices to do
17 it.

18 We're trying to give them the information we can as
19 quickly as possible. Although to them it may not seem like
20 we're doing it, we're working as hard as we can to get it to
21 them. So by the time we get the stuff to them and then we got
22 to get the new information too and do all the calculations we
23 have to do, including putting forth our best effort with
24 experts and stuff, it's just going to take more time. And
25 that's why I've come to the Court now to tell you that. I

1 think by November we will be ready.

2 And, oh, by the way, I did comply with the local rule
3 by getting extra dates, although it seems kind of crazy that
4 the other side is going to oppose your motion to continue to
5 have to get extra dates when they don't want you to do it
6 anyway.

7 MR. MASTERS: Your Honor, I'm not -- I don't know
8 exactly what David and Kevin do. I don't know. It's not their
9 job to go into the bowels of EQT and pull out data and
10 information. And they've had our request -- their client has
11 had our request for months now. I've tried to work with them
12 and make it as easy as I could, and they still said, well, you
13 don't need this and you don't need that and it's over here and
14 it's not over there, it's not there, it's somewhere else I
15 don't have, and continuing to put this off.

16 If I thought in November things would be different
17 between now and then, I probably wouldn't care. But in terms
18 of the -- getting this stuff in one place so my experts could
19 actually look at it and have time to look at it, I just don't
20 see them doing it. I honestly don't. The things they're
21 talking about today, I'm not sure what they're going to tell me
22 after this hearing. But to put the trial date off from May
23 seems to me to be just prolonging the fight over what's
24 relevant or discoverable and what we are able to get to our
25 experts on what they admit is complex.

1 And that's -- they have the decision in terms of
2 Leggett that we're left with reasonable and actual. And in
3 that situation then we're entitled, the same as if it was a big
4 accounting case, to get in there and try to figure it out. And
5 you got to have the documents. We don't have their general
6 ledger, which is done by JD Edwards. We do have their
7 allocation database which shows where they're allocating stuff
8 from.

9 I took the deposition of Mr. Piccirilli, the second
10 deposition, here in the last part of the year after we had some
11 data, and he had -- the things he identified in there that
12 were, I thought, relevant and discoverable to this point I
13 specifically asked for. We still don't have that. So putting
14 it off I'm not sure is ever going to make any difference.
15 First of all, I don't think they can prove what they're trying
16 to say anyway, that it's reasonable. I don't think they can
17 prove that.

18 MR. HENDRICKSON: They do have the information from
19 Mr. Piccirilli. We've just heard for the first time this week
20 or last week that they can't access some of the links. I'm not
21 a technocrat. We're going to try to work that out tomorrow and
22 figure out what that means. They'll have 90 percent of
23 everything they asked us for through November of last year
24 before the end of the week.

25 And so all I'm saying is, look, I understand that his

1 clients deserve their day in court. Ours do too. We have to
2 be able to put our best foot forward. Whether or not you
3 believe what we're doing or you don't believe what we're doing,
4 it doesn't matter. We have to have the time to prepare, to
5 make sure we put the best case forward for our clients. We
6 can't do that by May, whether Mr. Marvin wishes we can do it or
7 not. I can do it by November.

8 THE COURT: Frankly, when the defendant states he
9 can't be ready by May, frankly, this Court doesn't believe it.
10 The motion to continue is denied. But am I correct we need to
11 move the notice date?

12 MR. MASTERS: I don't think we can -- I think it has
13 to be March, probably the first of March, another two weeks,
14 probably March 1 or something.

15 THE COURT: If we do that, does it affect --

16 MR. MASTERS: That's the other issue.

17 THE COURT: -- does it affect the trial date?

18 MR. MASTERS: Let me -- I'm not too with it today,
19 Your Honor.

20 April 14th is the opt-out date. Sixty days, I had it
21 scheduled for 60 days after the notice was sent for them to opt
22 out. Of course, we have to have a -- they'd have three weeks,
23 I guess. What is the date in May?

24 MR. HENDRICKSON: May 21st, isn't it? I believe it
25 is. I'm not sure.

1 MR. MASTERS: That would leave -- it depends how much
2 time you want to give them for opt-out. I mean, normally I
3 think 60 days is probably a fair time.

4 So if you move both of them two weeks, your opt-out
5 date would be May 1, trial starts three weeks later. I don't
6 know. That is pushing it, Your Honor, honestly.

7 THE COURT: Well, it's pushing it, although your
8 case, the plaintiffs' case, and the defendants' case, is not
9 going to be based on an individual or an individual lease.
10 We're going to be looking at the districts, whatever they are,
11 and whether the costs are reasonable, actual, and appropriately
12 allocated to the districts. I don't think that the identity of
13 somebody -- all that is is you are going to be bound or not
14 bound, so I don't think it makes that big a difference.

15 We will make notices mailed by March 1. Let me see
16 if that's a -- I do things like that. March 1 is during the
17 week. We'll have them due by April 30. A little less than 60
18 days.

19 Anything else?

20 MR. MASTERS: The plaintiff has nothing, Your Honor.

21 MR. HENDRICKSON: Nothing.

22 THE COURT: All right. Thank you.

23 (Proceedings concluded at 11:02 a.m.)
24
25

CERTIFICATE

I, Cindy L. Knecht, Registered Professional Reporter and Official Reporter of the United States District Court for the Northern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above-styled action on January 31, 2018, as reported by me in stenotypy.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 5th day of February 2018.

/s/Cindy L. Knecht

Cindy L. Knecht, RMR/CRR
Official reporter, United States
District Court for the Northern
District of West Virginia